No. 89-843 (3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AMERICAN CYANAMID COMPANY

and

ROHM & HAAS COMPANY,
Petitioners,

v.

JAMES E. O'NEIL, in his capacity as Attorney General for the State of Rhode Island,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

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STATUTE

Comprehensive Environmental Response, Compensation and Liability Act, § 107, 42 U.S.C. § 9607 1

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REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition demonstrates the extreme position taken by the government in imposing joint and several liability on petitioners in this case, as well as the extent to which that position deviates from Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and the case law construing that provision. The petition answers most of respondent's points; only four require further comment.

1. Respondent contests petitioners' status as *de minimis* contributors of waste to the Picillo site on the basis

of speculative language in the Court of Appeals' opinion. Respondent's efforts fail, however, in the face of the trial court's *undisputed* findings that demonstrate that petitioners collectively were responsible for less than 0.5% of the total wastes found at the site. The fact that respondent arbitrarily has refused petitioners' requests to be accorded *de minimis* status does not mean that petitioners' nexus with the site is not, in fact, *de minimis*.

In its decision, the district court noted that "the plaintiff claims the following materials found at the site were specifically traced to the defendants: 303 five-gallon cans and 49 fifty-five gallons drums to Rohm & Haas; * * * and 10 fifty-five gallon drums to American Cyanamid." App. 20a. After discussing the evidence supporting these claims, the trial court ruled, with respect to Rohm & Haas, that "I accept the State's estimate as to the quantum of material found at the dump * * *," App. 45a, and that, with respect to American Cyanamid, "I find that this defendant is responsible for ten drums of toxic hazardous material found at the site." App. 49a. Since respondent does not dispute that the site's overall waste volume amounted conservatively to 20,000 drums, it follows that petitioners' combined percentage share of the site's waste amounted to less than 0.5% of the total.

As noted in the petition (*see* Pet. at 12), parties responsible for less than 1% of the waste at Superfund sites traditionally qualify for *de minimis* status at those sites. Another court in the same circuit that issued the decision below recently confirmed this rule. *See United States* v. *Cannons Engineering Corp.*, C.A. No. 88-1786 WF (D. Mass. Aug. 14, 1989), slip op. at 38, 40. Had petitioners' waste gone to the Cannons Engineering site in Massachusetts, they evidently would have qualified as *de minimis* parties; yet under the decision below, at the Picillo site in next-door Rhode Island, they do not. Such inconsistent and haphazard application of the statute is untenable, and this Court's review of the First Circuit's

decision is required to bring uniformity to this area of CERCLA case law.

Respondent points to the *de minimis* settlement reached with Rutgers University at the Picillo site as evidence that *de minimis* status was granted to at least one party in this case, with the implication that a similar settlement might have been available to petitioners. As noted in the petition, however (Pet. at 18), although petitioners actively sought *de minimis* status, at no time were they offered the opportunity to settle their liabilities as *de minimis* parties. Respondent's refusal to recognize petitioners' entitlement to *de minimis* status is at the core of the dispute between the parties in this case; respondent's conclusory assertion that petitioners are not *de minimis* parties (Opp. Cert. at 3-5) merely highlights the issue, and does not resolve it.[1]

Moreover, the consent decree for the Rutgers settlement, which is attached as an appendix to respondent's brief in opposition, illustrates respondent's extreme and erroneous application of *de minimis* principles in this case. As respondent acknowledges, Rutgers contributed only one "container" of hazardous material to the site—actually, a small bottle of grignard reagent which respondent concedes did not even cause a release to the environment—and yet was forced to pay $50,000 to settle its liability. *See* Opp. Cert. at 3. By contrast, Hydron Laboratories Inc., a non-*de minimis* party responsible for

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[1] In the opposition, respondent implies that petitioner Rohm & Haas is not entitled to *de minimis* status in part because the company "allow[ed]" materials from some of its drums to leak into the soil at the site. Opp. Cert. at 6. This is a misleading account of the facts. In reality, any leakage occurred *before* Rohm & Haas came to the site and voluntarily undertook, at its own expense, the removal of its (and others') waste materials from the site, and/or was caused by the bulldozers of *respondent's* contractors. *See* Pet. at 5; App. 45a.

21 *drums* of waste, settled for $92,400.[2] The juxtaposition of these two settlements demonstrates the illusory nature of the Rutgers "*de minimis*" settlement, and confirms that respondent abandoned any pretense of achieving equity or complying with Congress' intent in its drive to extract settlements in this litigation.[3]

2. Respondent urges this Court to refrain from reviewing the decision below on the theory that petitioners should be forced to litigate potentially lengthy contribution actions against other parties before the fairness of the decision below can be assessed. Opp. Cert. at 8-12. This position contravenes Congress' decision that *de minimis* parties should not have to bear such a burden under CERCLA. Congress made clear when enacting CERCLA in 1980, and again when amending it in 1986, that joint and several liability should not be applied in all cases, and particularly not with respect to *de minimis* parties. *See* Pet. at 12-15. Respondent's argument that it would be premature for this Court to assess the unfairness visited upon petitioner in this case until petitioners' contribution actions have taken their course misses this point entirely.

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[2] Respondent accuses petitioners of portraying the nature of other parties' settlements at the site inaccurately. Opp. Cert. at 2-3. Petitioners noted that the principal settlement involved a cash payment of $2.3 million and a commitment to perform soil remediation. Pet. at 7. Petitioners chose not to place a dollar value on the soil remediation activity—which in general terms involves removal of two piles of contaminated dirt—because those costs are presently unknown. The $3.5 million figure attributed to the cleanup in respondent's brief is precisely what respondent labels it: an estimate, and nothing more.

[3] Moreover, because Rutgers agreed to settle with respondent at this site, the University, unlike petitioners, did not go to trial. Accordingly, there has been no occasion for the Court of Appeals to engage in speculation, as it did with petitioners, regarding the possibility that the volume attributed to Rutgers by the State might account for only some of the University's wastes actually shipped to the site. Respondent offers no explanation as to why Rutgers' assigned volumetric contribution amount should be accepted at face value, but not petitioners'.

Contribution actions in CERCLA cases are time-consuming, burdensome and extremely expensive. Since petitioners have been forced to file such actions here only because of respondent's refusal to honor the statutory intent against imposing joint and several liability upon *de minimis* parties, requiring petitioners to complete this litigation as a prerequisite to review would only compound the error, and not offer a realistic chance to cure it.

3. Respondent's attempt to portray the decision below as in conformity with the case law simply ignores the large volume of decisions in which the courts have refused to permit the automatic imposition of joint and several liability in CERCLA cases, precisely because imposing such liability on *de minimis* parties such as petitioners would be highly inequitable and would violate Congress' intent. Respondent cites but two cases, most notably *United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 3156 (1989). Yet even the *Monsanto* decision expresses the court's clear "concern that [defendants] not be ultimately responsible for reimbursing more than their just portion of the governments' response costs." 858 F.2d at 173. Contrary to respondent's suggestion, and as discussed in the petition, the courts that have construed CERCLA repeatedly have cautioned against rigid application of the harsh joint and several liability doctrine in Superfund cases; they have also recognized the need to protect the interests of small and/or non-settling parties. *See* Pet. at 15-16 (citing *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) and other cases).

4. In responding to petitioners' constitutional argument, respondent incorrectly states that petitioners concede the constitutionality of retroactive application of CERCLA to pre-enactment acts. Opp. Cert. at 12. To the contrary, petitioners have expressly challenged the constitutionality of the statute on this ground. *See* Pet. at 23-25.

With respect to petitioners' separate challenge to the retroactive application of CERCLA to pre-enactment *costs*, respondent merely asserts, without any citation of authority, that cases involving such costs are few and dwindling in number. Opp. Cert. at 12, 14. In reality, it is the experience of petitioners and their counsel that Superfund cases involving pre-enactment costs are not uncommon.

CONCLUSION

For the foregoing reasons, as well as those in the petition, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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